

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

PETITIONER, :

vs. :

Case No. SC22-524

JOSHUA LYLE CRELLER, :

RESPONDENT. :

_____ :

**ON PETITION FOR REVIEW FROM THE SECOND
DISTRICT COURT OF APPEAL, STATE OF FLORIDA
CASE NUMBER 2D19-3085**

RESPONDENT’S AMENDED JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF CONTENTS | ii |
| TABLE OF CITATIONS | iii |
| STATEMENT OF THE ISSUE | iv |
| STATEMENT OF THE CASE AND FACTS | 1 |
| ARGUMENT | |
| A. This Court has jurisdiction because of the certified conflict between the Second District and Fifth District court of appeals. | 6 |
| B. <u>State v. Benjamin</u> was wrongly decided. | 6 |
| CONCLUSION | 14 |
| CERTIFICATE OF SERVICE | 14 |
| CERTIFICATE OF COMPLIANCE | 15 |

TABLE OF CITATIONS

Page No.

Maryland v. Wilson, 519 U.S. 408 (1997) passim

Pennsylvania v. Mimms, 434 U.S. 106 (1977). passim

Rodriquez v. United States, 575 U.S. 348 (2015) 4, 8, 10

State v. Benjamin, 229 So. 3d 442 (Fla. 5th DCA 2017) passim

OTHER AUTHORITIES

§ 316.074(2), Fla. Stat. (2018) 1

Amend. 4, U.S. Constitution. iv, 14

Art. V, § 3(b)(4), Fla. Const. 6

Fla. R. App. P. 9.045(e). 15

STATEMENT OF THE ISSUES

The Fourth Amendment does not prohibit law enforcement from seizing a driver by ordering him out of his vehicle if doing so is necessary to ensure officer safety during the time it takes to issue a citation after a stop justified by probable cause that a traffic infraction has been committed.

The Fourth Amendment does not prohibit law enforcement from using a drug-sniffing dog on a random basis to ascertain whether there might be probable cause believe that illegal drugs are contained within the vehicle.

The issue here is:

Does the Fourth Amendment prohibit the forced removal of a person from a vehicle before there exists probable cause that contraband exists, and without any evidence that such a seizure is necessary to ensure officer safety during the issuance of a traffic citation?

STATEMENT OF THE CASE AND FACTS

On December 20, 2018, Gustavo Diaz, a police officer with the Tampa Police Department, was working undercover on the narcotics tactical team and was driving an undercover car [Pet. App. 4].

Officer Diaz saw a vehicle make a right turn into a gas station. The vehicle slowed and then continued through the gas station and exited onto the street. The officer believed that the vehicle drove into the gas station and onto the street to avoid the red light at the corner, a violation of § 316.074(2), Florida Statutes (2018), which prohibits a person from driving any vehicle from a roadway to another roadway to avoid a traffic control device [Pet. App. 4].

Officer Diaz radioed for a marked unit with lights and siren to conduct a traffic stop because his undercover car had no lights or siren. A uniformed officer arrived in a car with lights and siren and conducted a traffic stop on the vehicle. Both officers approached the vehicle, one on either side. Officer Diaz held up his badge as he made contact with Respondent, Mr. Creller, and identified himself.

Mr. Creller, who was alone in the car, gave the officer his license, registration, and insurance information [Pet. App. 5]. Mr. Creller's information was in order. The vehicle he was driving was not stolen and his driver's license was not suspended. Mr. Creller had no outstanding warrants.

Officer Diaz asked to search the vehicle and Mr. Creller said no. Officer Diaz did not ask Mr. Creller to step out of the vehicle at that time. Instead, he returned to his car and radioed for a K-9 unit to conduct a sweep of the vehicle [Pet. App. 5].

Officer Diaz wanted to search Mr. Creller's car even though he saw no sign of impairment or any criminal activity. The only reason that Mr. Creller's vehicle was stopped was because of the traffic infraction that the officer witnessed.

Officer Diaz instructed the uniformed officer to write the traffic citation. This officer testified that it takes on average five minutes or so to issue the citation [Pet. App. 5].

While the officer was completing the citation, the K-9 unit arrived. The K-9 officer identified himself and asked if Mr. Creller

had anything illegal in the car and then asked for permission to search the vehicle. Mr. Creller said no. The K-9 officer then asked Mr. Creller to exit the car so that he could conduct a vehicle sweep with his dog. The officer asked Mr. Creller to step out of the car for officer safety, as it is standard procedure to ask all occupants to exit the car. The officer said it also was standard procedure that he didn't need permission from the driver of the car to conduct a vehicle sweep. He explained that to Mr. Creller [Pet. App. 6].

Mr. Creller refused to comply.

The K-9 officer testified why he needed Mr. Creller out of the car during the dog sweep. He said:

[Creller]'s in possession of his vehicle. I don't know what's in the vehicle...If I'm in the front of the vehicle with my dog, he could put it in drive. My main concern is to watch my dog, to read my dog...I can't be distracted with what the defendant was doing inside the vehicle. So I always tell everybody to exit the vehicle.

[Pet. App. 6-7].

Mr. Creller's vehicle was in park and turned off [Pet. App. 19].

The K-9 officer and Officer Diaz forcibly pulled Mr. Creller

from his vehicle. Mr. Creller was placed under arrest for obstruction for not getting out of his vehicle so that the police dog could sweep his car.

Mr. Creller was handcuffed. In a search incident to an arrest, Officer Diaz found a plastic baggie in Mr. Creller's left shirt pocket, containing a crystallized substance that was later identified as methamphetamine [Pet. App. 7].

The trial court concluded, relying on Rodriguez v. United States, 575 U.S. 348 (2015) that because the duration of the vehicle sweep did not prolong the traffic stop, Mr. Creller's removal from the vehicle was justified [Pet. App. 8-9].

At trial, Mr. Creller was convicted of possession of a controlled substance and resisting an officer without violence [Pet. App. 3].

The Second District Court of Appeal reversed, finding that the K-9 officer's command for Mr. Creller to exit his vehicle was not necessary for the officers to safely complete the traffic stop. Instead, the court held that ordering Mr. Creller from his vehicle was random, and not motivated by any suspicion of contraband.

Removal of Mr. Creller from his vehicle was not necessary to ensure officer safety for the purpose of issuing a traffic citation. “The officer made it clear that they asked the driver to step out of the vehicle to accommodate an arbitrary investigative sweep admittedly based on no suspicion of criminal safety whatsoever” [Pet. App. 19].

The Second District certified a conflict with State v. Benjamim, 229 So. 3d 442 (Fla. 5th DCA 2017)[Pet. App. 21].

ARGUMENT

A. This Court has jurisdiction because of the certified conflict between the Second District and Fifth District court of appeals.

The Second District Court of Appeal has certified a conflict with the Fifth District Court of Appeal in State v. Benjamin, 229 So. 3d 442 (Fla. 5th DCA 2017). This Court has discretionary jurisdiction and should review this case. See, Art. V, § 3(b)(4); Fla. Const. (This Court may review any decision of a district court of appeal that is in direct conflict with a decision of another district court of appeal).

B. State v. Benjamin was wrongly decided.

The court in Benjamin held that following a lawful detention for a traffic infraction, officers can order the driver to exit the vehicle even without a particularized basis to believe the driver was a threat to officer safety.

Benjamin relied on Pennsylvania v. Mimms, 434 U.S. 106 (1977) and Maryland v. Wilson, 519 U.S. 408 (1997).

In Mimms, the United States Supreme Court held that an

officer's command to exit the vehicle after the driver was lawfully detained was "reasonable and thus permissible under the Fourth Amendment" because the threat to the officer's safety outweighed the "incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped." Mimms, 434 U.S. at 109. The Court also extended this doctrine to passengers – "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop" Wilson, 519 U.S. at 415.

The rationale behind these two decisions is officer safety, specifically in connection with a traffic stop. Mimms, 434 U.S. at 110 (recognizing "the inordinate risk confronting an officer as he approaches a person seated in an automobile,"); Wilson, 519 U.S. at 413 ("[T]he same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger.")

Mr. Creller was first asked to exit his vehicle when the K-9 officer asked him to do so for officer safety and so that the dog could conduct the sweep around the car. No such request or

command was made when Officer Diaz first approached the vehicle or when the K-9 officer arrived and asked Mr. Creller for consent to search. The only safety concerns asserted by the State were those described by the K-9 officer who wanted to perform a random narcotics sweep that was not supported by probable cause.

The Second District correctly concluded that the safety issue in Mr. Creller's case was not related to the issuance of the traffic citation but rather to the vehicle sweep.

The United States Supreme Court has said that the "government's officer safety interest" recognized in Mimms "stems from the mission of the [traffic] stop itself, whereas "[o]n-scene investigation into other crimes....detours from that mission" and a seizure would not be justified for that purpose even if necessitated by officer safety. Rodriguez v. United States, 575 U.S. 348, 356-357 (2015)("Thus, even assuming that the imposition here was no more intrusive than the exit order in Mimms, the dog sniff could not be justified upon the same basis.").

Based on this reasoning, the Second District stated that the

officer-safety justification given by the K-9 officer would not make his command for Mr. Creller to exit his vehicle for the sweep constitutionally permissible.

In Benjamin, the Fifth District held that following a lawful detention for a traffic infraction, police can order the driver to exit the vehicle even without a particularized basis to believe that the driver was a threat to the officer's safety.

In Benjamin, officers approached a vehicle in a shopping center after they observed its owner driving with what they suspected was an illegal window tint. The officer asked permission to search the vehicle and the driver refused. The officer then requested a K-9 unit to conduct an exterior search of the car. While he was writing the citation, the K-9 unit arrived and told the officer to remove the driver from the car. As the driver stepped out of the car at the officer's direction, the officer saw a firearm under the driver's seat that had been hidden by Benjamin's leg.

The Fifth District concluded that based on Mimms and Wilson the trial court erred in granting the motion to suppress where the

command to exit the vehicle occurred while the driver was lawfully detained. Id. at 443-44.

As the Second District correctly pointed out, the rationale relied upon by the Fifth District in Benjamin and applied to Mr. Creller's case "essentially stacks the holdings in Rodriguez and Mimms: 1) vehicle sweeps are permissible when they do not prolong a valid traffic investigation; 2) officers may ask drivers to exit their vehicles during a valid traffic investigation; 3) therefore, as long as it does not prolong the traffic investigation, officers may order drivers to exit their vehicles for the vehicle sweep" [Pet. App. 16].

The Second District said that this reasoning appears to be an "erroneous extension of the carveouts in Mimms and Rodriguez." [Pet.App. 16]. Rodriguez expressly held that a deviation from the mission of the traffic stop such as the K-9 officer's attempted vehicle sweep has no support from Mimms because "safety precautions taken in order to facilitate such detours" cannot "be justified on the same basis" as those taken to ensure officer safety for the purpose of conducting the traffic stop itself. See, Rodriguez,

575 U.S. at 356-57.

The Second District also stated that the Fifth District's stacking "conflates two incompatible rationales without examining their underpinnings, leading to an illogical conclusion" [Pet. App. 17]. Officers may ask drivers to exit their cars during traffic stops when such removal is justified by officer safety concerns. And, a vehicle sweep during a traffic stop is permissible because the driver is already stopped based on probable cause to believe he committed a traffic infraction.

But in Mr. Creller's case, nothing indicated that his removal from the car was necessary to ensure officer safety to complete the traffic stop. The testimony left no doubt that it was the vehicle sweep alone, not the issuance of the traffic citation, that gave rise to any threat to officer safety.

The Second District held that the vehicle sweep of Mr. Creller's car was random, and not motivated by any suspicion that there was contraband. It was the traffic infraction that was supported by probable cause, not the existence of illegal drugs in the car.

The record clearly establishes that Mr. Creller's removal from the vehicle was not necessary to ensure officer safety for the purpose of issuing a traffic citation. The officers made it clear that they asked the driver to step out of the vehicle "to accommodate an arbitrary investigative sweep admittedly based on no suspicion of criminal activity whatsoever" [Pet. App. 19].

The Court held that the forced removal of Mr. Creller from his vehicle that was based on a random, arbitrary search was an unreasonable seizure in violation of his Fourth Amendment rights.

Contrary to the Petitioner's argument, upholding Mr. Creller's case does not put police officers at risk during traffic stops. Police are still allowed to order a person him out of his car if doing so is necessary to ensure officer safety during the time it takes to issue a citation after a stop justified by probable cause that a traffic infraction has been committed. And, the police are still allowed to use a drug-sniffing dog to ascertain whether there might be probable cause to believe that illegal narcotics are contained within a vehicle. The Constitution allows for that and Mr. Creller's case

does not change that.

What police are prohibited from doing is forcibly removing a person from his vehicle before probable cause of the existence of contraband has been established and without any evidence that such a seizure is necessary to ensure officer safety during the issuance of a traffic citation. That is what happened to Mr. Creller and that is an unreasonable seizure without any justification under the Fourth Amendment.

Had there been evidence that forcing Mr. Creller from his car was done out of a reasonable concern for the safety of the officer issuing a citation during a stop justified by probable cause to believe that a traffic violation had occurred, then the removal would have been justified. But no such evidence was adduced here.

And, if the evidence supported that forcible removal was necessary to ensure officer safety for a vehicle sweep that itself was justified by probable cause of the presence of contraband, as opposed to a random, arbitrary search like the one in this case, then the removal would constitute a reasonable seizure. But, no

such probable cause was argued or supported by the evidence.

The forced removal of Mr. Creller from his vehicle was an unreasonable seizure under the Fourth Amendment.

CONCLUSION

This Court has jurisdiction and should grant review and find that State v. Benjamin was wrongly decided.

CERTIFICATE OF SERVICE

I certify that a copy has been E-mailed to Jeffrey Paul DeSousa, Chief Deputy Solicitor General, Office of the Attorney General at jeffrey.desousa@myfloridalegal.com and jenna.hodges@myfloridalegal.com on this 13th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Initial Brief is 14-point Bookman Old Style, in compliance with Fla. R. App. 9.045(e). This brief contains 2,439 words.

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